

ANDERSON EXHIBIT 11

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL)
INDUSTRY AVERAGE WHOLESALE)
PRICE LITIGATION) MDL No. 1456
THIS DOCUMENT RELATES TO:) Civil Action No.
US ex rel Ven-A-Care of) 01-12257-PBS
the Florida Keys, Inc.)
v. Abbott Laboratories, Inc.)
No. 07-CV-11618-PBS)

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VIDEOTAPED ORAL DEPOSITION OF JOSEPH E. FISKE

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Volume 1

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February 17, 2009

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DEPOSITION upon videotaped oral
examination, of the witness, JOSEPH E. FISKE, taken
on behalf of Ven-A-Care of the Florida Keys, Inc. in
the above entitled cause pending in the United States
District Court, District of Massachusetts, before
TAMMY POZZI, Certified Shorthand Reporter in and for
the State of Texas, on February 17, 2009, in the law
offices of Jones Day, 77 West Wacker, 35th Floor,
Chicago, Illinois, between the hours of 9:05 a.m. and
4:49 p.m., pursuant to due notice and the Federal
Rules of Civil Procedure.

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Mr. Paul Lynn

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yesterday -- I take it you reviewed those -- reviewed those documents yesterday with Mr. Berlin, correct?

A. There were documents that we reviewed yesterday, as well as documents that I had reviewed at other times, like I said, when I was reading the depusi- -- depositions --

Q. Uh-huh.

A. -- and I don't recall whether we reviewed any documents when we met a few weeks ago.

Q. Other -- other than reviewing documents with Mr. Berlin and reviewing deposition exhibits that were a part of the DeYoung, Joe Fiske, and Beth Garvin depositions, did you review any other documents?

A. I looked at some bid schedules. I looked at some contract documents. I looked at some price increase notifications. I believe that's the extent of what I looked at.

Q. Did you review any documentation from the Managed Care division or department?

A. No, I didn't.

Q. Did you review any bid materials exchanged between Abbott and customers, such as GPOs or chain pharmacies or wholesalers who would request that Abbott bid for placement of its drugs on those customers' formularies?

A. Only to the extent that they may have been part of the documents that I reviewed that were part of previous depositions.

Q. Did you review any government documentation such as OIG reports?

A. Not at this point in time. I've seen such documents over the -- over the course of my career in Pricing.

Q. When -- let me back up a step. When I refer to the "OIG," do you understand I'm referring to the Office of Inspector General for Health and Human Services?

A. Yes.

Q. Okay. When -- strike that.

In what context in the past have you reviewed OIG reports?

A. Periodically people would send me reports, and I can't tell you exactly in what context. One I remember is a report regarding GPO admin fees that was issued -- I believe it was OIG that issued it --

indicating that -- I believe that a number of GPOs were passing those admin fees along to their customers, which would imply that they were a discount rather than just an admin fee.

Q. Can you remember the subject matter of any other OIG reports that you reviewed?

A. Not that I reviewed. There -- there -- I'm sure there are others that I have seen. I just --

Q. Uh-huh.

A. -- don't recall right off the top of my head.

Q. Other than the -- the OIG reports pertaining to administrative fees of GPOs, are you aware of any other OIG reports reviewed by Abbott personnel --

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16 A. Yes.
 17 Q. -- specifically? which ones?
 18 A. Martha Schrader was familiar with OIG
 19 reports that were issued regarding the fact that AWP
 20 pricing reported by the data agencies did not reflect
 21 actual acquisition costs by retail pharmacies.
 22 Q. That -- you gained that information in your
 23 discussion with Ms. Schrader recently?
 24 A. Yes.
 25 Q. When did Ms. Schrader review those reports?

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1 A. She didn't give me a specific time frame.
 2 I didn't ask her for a specific time frame.
 3 Q. Did Ms. Schrader provide you with those --
 4 any copies of those reports?
 5 A. No, she didn't.
 6 Q. What was your understanding of the findings
 7 of these reports?
 8 A. They were reports that were issued, I
 9 believe, to Health and Human Services -- and
 10 obviously available, actually, for the public, which
 11 means states and others would have access to them --
 12 that, as I described previously, indicated that AWP
 13 as reported by the -- by the data agencies overstated
 14 acqu- -- actual acquisition costs versus what
 15 pharmacies were actually paying for product.
 16 Q. Do you have any understanding of the
 17 specific findings with respect to how much AWP
 18 overstated actual acquisition cost?
 19 A. No, I don't.
 20 Q. Do you have any information about the
 21 findings of these reports with respect to generic
 22 drugs versus brand drugs?
 23 A. No, I don't.
 24 Q. Do you have any information about the
 25 findings of these reports with respect to any given

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1 manufacturer's drugs?
 2 A. No, I don't.
 3 Q. Do you know whether it was one single
 4 report or multiple reports that Ms. Schrader had
 5 reviewed?
 6 A. From my discussion, I believe it was
 7 multiple reports, but I can't state that with
 8 certainty.
 9 Q. Did you gain any understanding about the
 10 context in which Ms. Schrader reviewed these reports?
 11 A. Martha Schrader is, as I described
 12 previously, our Divisional Vice President for Public
 13 Policy and Strategy.
 14 Q. Uh-huh.
 15 A. She had previously worked for another
 16 manufacturer. I don't know exactly what her
 17 responsibilities were there. But in the course of
 18 her job responsibilities, she keeps abreast of
 19 legislation, reports that are coming out from the
 20 government, etcetera, as it might affect the industry
 21 in general.
 22 Q. Has Ms. Schrader or anyone working for
 23 Ms. Schrader ever had any responsibility for setting
 24 of prices on Abbott drugs?
 25 A. No.

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Q. To your knowledge, has anyone at Abbott who's ever had any responsibility for setting prices on Abbott drugs reviewed any OIG reports concerning AWP?

MR. BERLIN: Objection, form and scope.

A. I don't know because I don't know whether I have actually specifically seen such a report myself. I -- as I indicated, I believe I've seen and read a -- a number of OIG reports, but I do an awful lot of reading in my job, and I can't remember specifically everything I've read.

Q. (BY MR. ANDERSON): Do you have any copies of any OIG reports in your files concerning published pricing such as AWP pricing?

A. I don't believe so, but I may have. I don't know.

Q. Have you searched for those?

A. When we searched for files for production for this case, we looked through any files that may have been labeled "AWP" or -- and I don't have a file that's called "OIG," so... We produced everything that we had.

Q. So if you had any --

A. I couldn't have looked through every file

that I have, quite honestly.

Q. Well, I understand, but I'm saying, to your knowledge, as the Abbott corporate representative, any OIG reports that would have been maintained in the files of Abbott personnel responsible for price setting would have been located in your prior searches; is that correct?

MR. BERLIN: Objection, form, scope.

A. I -- I can't state for certainty. My personal experience is that we have very man- -- you know, many, many files. We try and produce everything that's related to a case when it's -- when the information is listed out for us in terms of what we need to provide.

It's possible that things may have been overlooked by somebody, but to the best of my knowledge, everything was produced that was available.

Q. (BY MR. ANDERSON): Is your awareness of any Abbott personnel's review of OIG reports limited to what you learned from Ms. Schrader?

A. Yes, I believe so.

Q. And Ms. Schrader didn't share with you any documentation regarding any OIG reports that she had reviewed, did she?

A. No, she did not.

Q. And you're not able to recall any of the specifics about the time frame for which the report was published, etcetera?

MR. BERLIN: Objection, form.

A. I didn't specifically ask that question.

Q. (BY MR. ANDERSON): Okay. Do you have any information whatsoever that Ms. Schrader shared her awareness of the OIG reports concerning AWP pricing with any other Abbott personnel, other than you, obviously, in preparing to testify?

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A. I'm going to answer the question this way, but I -- it is somewhat speculative. She manages a group of people. And, in fact, one of the people who worked for her at one point in time used to do web searches for different kinds of information affecting the industry, and she -- she may have shared such information with one of her employees or he may have been the source for the -- for the report but I don't know.

To my knowledge, she did not share that information with Pricing and Planning, but I wa- -- I want to be careful because the employee, Tom -- I can't recall his last name right now -- used to actually copy us periodically on, like, a -- a --

a daily newsletter of key happenings, just excerpts of things.

But I don't recall specifically an OIG report coming from Martha's group to us.

Q. How long has Martha been in her -- well, strike that.

How long has Ms. Schrader been with Abbott?

A. Six years.

Q. So the earliest time frame that she could have been reviewing OIG reports while at Abbott would have been 2003 -- 2002 at the earliest?

A. Correct. But she -- as I indicated, she had similar responsibilities, I believe, at another company. But at Abbott, that's a correct statement.

Q. Right. What was that other company?

A. I think it was Amgen, but I --

Q. Okay.

A. -- I don't want to be -- I may be mistaken.

Q. But not a company that was affiliated in any way with Abbott?

A. Not to my knowledge.

Q. Okay. All right. We'll come back to that potentially.

What did you discuss with Ms. Tobiason in prep- -- preparation to testify as the corporate representative?

A. I actually just reviewed the various topics that I was supposed to be prepared to testify on and actually went through them one by one with her. She had very little knowledge about most of those issues.

Her title is Senior Director of Reimbursement for Corporate. She's held -- I think she's been with Abbott since 1994. She started off in the Hospital Products Division where she was Director of Reimbursement for the Home Infusion group --

Q. Uh-huh.

A. -- subsequently worked in ADD as Director of Reimbursement. Her focus was not on oral pharmaceuticals. Her focus has always been on -- on "Part B drugs," I'll refer to them as -- I'm sure you know what I mean --

Q. Uh-huh.

A. -- Medicare Part B, or devices.

And so when I talked with her, she --

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can't recall.

Q. And it -- it looked -- it had the same type of form cover letter that's shown on the second page of Exhibit 9?

A. I'm -- I'm -- I'm sorry. I recall this (indicating).

Q. The stamp?

A. The stamp, that's all I specifically recall.

Q. All right.

A. I don't -- I don't remember what we reviewed.

Q. Does Exhibit 9 appear to you, sir, to be an example of a standard communication that Abbott sent out to the pricing compendia?

A. It -- it looks like a communication to a pricing compendia, yes.

Q. And there's -- I notice the first page is a fax cover sheet from Abbott in this case to Medical Economics, correct?

A. Yes.

Q. Do you believe that this same type of fax cover sheet would have been utilized to transmit the same type of information to First DataBank as well?

A. Something similar to that.

Q. So looking at the second page of Exhibit 9, I -- do you agree with me that that is a form cover letter that Abbott would create to transmit information to data vendors?

A. I would agree with that, yes.

Q. And the data vendors would include First DataBank and Red Book and Medi-Span, correct?

A. Yes.

Q. And those are the same three data service companies that were referenced at the bottom of the first page of Exhibit 8, correct?

A. (Reviews document.) Yes.

Q. Why did --

A. Well, two of them.

Q. Why -- why did Abbott report information to the data vendors such as that shown in Exhibit 9?

MR. BERLIN: Objection, form, asked

and answered.

A. It was our standard practice whenever we launched a product to report the pricing information to the data vendors. It had always been done.

Q. (BY MR. ANDERSON): Other than the fact that it was something Abbott itself had always done, was there any other information that underlied Abbott reporting this type of information to the data vendors?

A. Not that I became aware of during my investigation.

Q. I notice on the third page of Exhibit 9 is the beginning of a price list, correct?

A. Yes.

Q. And there's -- there's three different types of prices listed. One is list price, the other is case price, and the last one is AWP price, correct?

A. Yes.

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Q. And so those would be prices that Abbott had set and, in turn, communicated to the data vendors, correct?

A. Yes.

Q. How did Abbott --

A. Well, we communicated an estimated AWP. We

set the WAC and the list price.

Q. Where --

A. The WAC price being the case price.

Q. Where is the AWP information noted to be an estimate?

A. I'm telling you that it was always an estimate. We actually changed the column at a subsequent date to read that it was an estimate to avoid any confusion.

Q. How might it be confusing if the AWP weren't noted to be an estimate?

A. I don't have an answer for that question.

Q. Do you agree that to the extent Abbott was reporting, quote, "AWPs" to the data vendors, it would appear that Abbott is setting the AWPs?

MR. BERLIN: Objection, form.

Objection, scope.

A. I don't agree with that.

Q. (BY MR. ANDERSON): What information would indicate that Abbott is not controlling this AWP?

A. Pardon me?

MR. BERLIN: Objection, form.

Objection, scope.

Q. (BY MR. ANDERSON): What -- what information would indicate that Abbott is not

controlling the setting of these AWPs?

MR. BERLIN: Objection, form.

Objection, scope.

A. There's no information on this sheet that says that.

Q. (BY MR. ANDERSON): Is there any information other -- beyond this sheet that you know of?

MR. BERLIN: Objection, form.

Objection, scope. But you -- you can answer.

A. All -- all I can continue to go back to, Mr. Anderson, is the conversation that Mark Turon had, for example, with Kay Morgan; that despite the fact that manufacturers may have been providing estimated AWPs, that the data vendors, especially First DataBank, was actually verifying or confirming what a correct AWP should be with the wholesalers themselves.

Q. (BY MR. ANDERSON): Did Mark indicate how long that conversation list- -- lasted?

A. No, he didn't. Knowing Mark Turon, it could have been an hour. He's a very -- very talkative man.

Q. And Mr. Turon is still with Abbott today?

A. He -- he works for Ross Pharmaceuticals.

I -- actually, it's called Abbott Nutritional, Inc. today, which is a division of Abbott Laboratories.

Q. Was he with Ross when he had this conversation with Kay?

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Q. Did Abbott make any disclosures to any state Medicaid program about the discrepancies between its AWP's and its AMPs?

MR. BERLIN: Objection, form. Objection to the term "discrepancy".

A. Did we?

Q. (BY MR. ANDERSON): Yes, sir.

A. No. Other than the states -- once we were required to report AMPs, the -- the four states that we had to report them to.

Q. The four states in the past three or four years or so?

A. It may have been longer with Texas, but yeah, that's right.

Q. Now I'm shifting, Mr. Fiske, to topic number 6. I'll ask some foundational questions first. Did Abbott publish direct or list prices for the erythromycins?

A. We communicated a WAC and a list price.

Q. And -- and generally, the -- the list price was simply five percent higher than the WAC price, correct?

A. Correct.

Q. And was the list price set off of the WAC or vice versa?

A. WAC was established and divided by .95 to arrive at the list price.

Q. Okay. And, likewise, WAC was the starting point for the calculation of the estimated AWP by Abbott, correct?

A. Yes.

Q. With respect to topic number 6, did you gather any information in preparing to testify?

MR. BERLIN: Make sure you're -- the -- the designation goes on to the second page of what you have.

A. (Reviews document.) The individuals I

spoke with had no knowledge regarding this topic whatsoever.

People within the Pricing and Contracting Department, including myself and Ronny Lancaster, who is our Senior Manager for Government Pricing, replaced Debbie DeYoung, are aware of the fact that we have reported AMPs to the government since 1991 and that -- you know, that this whole thing, the way it's worded, is -- it sort of misrepresents the facts.

We didn't cause publication of direct or list prices that were higher than the prices generally paid because we had a WAC and a list price that was generally paid by purchasers at all times, as was a base deal price generally paid by other customers, as was a contract price, as I said before, generally paid by the customers that purchased that contract price. So --

MR. BERLIN: I think we need to -- I think he may have misspoken, and I need to talk to him to get him to clarify that now.

MR. ANDERSON: Well, I -- I'd like to follow up on that. I may clarify it now.

MR. BERLIN: Well -- well, no. I